

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of

Rules and Regulations Implementing the
Telephone Consumer Protection Act
of 1991

CG Docket No. 02-278

**PETITION OF THE CONSUMER ELECTRONICS ASSOCIATION FOR
CLARIFICATION OR, IN THE ALTERNATIVE, RECONSIDERATION**

INTRODUCTION

The Consumer Electronics Association (“CEA”), pursuant to Section 1.429 of the Commission’s Rules, 47 C.F.R. § 1.429, respectfully requests the Commission to clarify that the above-captioned *Order*¹ does not restrict the right of not-for-profit associations, including trade associations, to send facsimile communications in furtherance of their not-for-profit purpose. Alternatively, if the Commission concludes that the *Order* does restrict the right of not-for-profit associations to send facsimile communications that constitute “advertisements,” CEA requests that the Commission reconsider its decision by creating a presumption that a person or company that joins a not-for-profit association thereby consents to receive facsimile advertisements from the association.

STATEMENT OF INTEREST

CEA is the principal trade association of the consumer electronics industry. CEA members design, manufacture, distribute, and sell a wide variety of consumer electronics

¹ See *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, CG Docket No. 02-278, FCC 03-153 (rel. July 3, 2003) (“*2003 TCPA Order*” or “*Order*”), *recon.*, FCC 03-208 (rel. Aug. 18, 2003) (“*Reconsideration Order*”).

equipment that spans the audio, video, mobile electronics, communications, information technology, integrated home systems, and accessories markets. Its membership includes most major manufacturers of consumer electronics products as well as small companies that design, produce, distribute, and service consumer electronics products. CEA, acting in furtherance of its not-for-profit purpose, routinely communicates with its members and other interested persons by sending facsimile messages.

CEA welcomes the Commission's recent decision to defer, until January 1, 2005, the effective date of its determination, in the *Order*, "that an established business relationship will no longer be sufficient to show that an individual or business has given express permission to receive unsolicited facsimile advertisements."² This will provide the Commission with ample opportunity to consider the many serious concerns that have been raised, provide needed clarification, and make any appropriate changes.

I. THE COMMISSION SHOULD CLARIFY THAT THE *ORDER* DOES NOT RESTRICT THE ABILITY OF NOT-FOR-PROFIT ASSOCIATIONS, WHEN ACTING IN FURTHERANCE OF THEIR NOT-FOR-PROFIT PURPOSE, TO SEND FACSIMILE COMMUNICATIONS

In the 2003 *TCPA Order*, the Commission eliminated the presumption that a person that has an "established business relationship" with a company has consented to receiving facsimile advertisements from that company.³ The Commission subsequently deferred the effective date of this change.⁴ As a result, effective January 1, 2005,

²*Reconsideration Order* ¶ 6. CEA previously supported the petition of the American Society of Association Executives for an Emergency Stay. See Letter from Gary Shapiro, President, Consumer Electronics Association, to Hon. Michael Powell, Chairman, Federal Communications Commission, CG Docket No. 02-278 (filed Aug. 11, 2003).

³ *Order* ¶¶ 188-91.

⁴ *Reconsideration Order* ¶ 1.

businesses will be required to get prior written consent before sending facsimile advertisements to their customers. Some observers have suggested that the elimination of the “established business relationship” presumption will also require *trade associations* to obtain written consent before sending certain facsimiles.⁵ CEA requests clarification that, in adopting the *2003 TCPA Order*, the Commission did not intend to require not-for-profit associations, including trade associations, to obtain prior consent before sending facsimile communications.

The Telephone Consumer Protection Act (“TCPA” or “Act”) does not restrict the authority of a not-for-profit association, when acting in furtherance of its not-for-profit purpose, to send facsimile communications. Rather, the Act prohibits any person from sending “an unsolicited advertisement to a telephone facsimile machine.”⁶ The Act further defines an “unsolicited advertisement” as “any material advertising the *commercial* availability or quality of any property, goods, or services which is transmitted to any person without that person’s prior express invitation or permission.”⁷ CEA submits that, because a not-for-profit association, when acting in furtherance of its not-for-profit purpose, does not make goods or services “commercially” available, the statutory restriction has no application to such organizations.

⁵ See, e.g., American Society of Association Executives, “*Do Not Call, Fax or Email: New Marketing Challenges for Associations*,” at 2-3 (July 23, 2003) available at http://www.asaenet.org/pdf/ASAE_Do_Not_Call_Fax_or_E-Mail_Handouts_v1.PDF.

⁶ 47 U.S.C. §227 (b)(1)(C).

⁷ *Id.* at §227(a)(4) (emphasis added); See *Missouri ex rel Nixon v. American Blast Fax, Inc.*, 323 F.3d 649, 655-56 (8th Cir. 2003) (Congress did not intend to restrict the sending of non-commercial facsimiles because it determined that such communications are less likely to be unexpected or unwanted than commercial facsimiles.).

Consistent with the statutory language, the Commission has never held that the TCPA restricts the ability of not-for-profit associations, acting in furtherance of their not-for-profit purpose, to send facsimile communications. However, the Commission's treatment of the ability of third parties to send commercial facsimiles to persons whose fax numbers are listed in a trade association directory has created some confusion.

In the *1995 Reconsideration Order*, the Commission addressed two separate issues related to the ability of businesses to send commercial facsimile advertisements. The Commission first held that the existence of an "established business relationship" – *i.e.*, a commercial relationship between a company and its customers – "establishes consent to receive telephone facsimile advertisement transmissions."⁸ Second, the Commission ruled that the "mere distribution or publication of a telephone facsimile number" in a "trade journal" or association membership list does not constitute consent to third parties to send unsolicited facsimile advertisements.⁹

In the *2003 TCPA Order*, the Commission revisited the two conclusions that it had reached in the *1995 Reconsideration Order*. First, the Commission eliminated the "established business relationship" presumption. This decision clearly affects businesses. Unless the Commission reconsiders this decision, effective January 1, 2005, the agency will no longer presume that "an established business relationship provides *companies*

⁸ *Rules and Regulations Regarding Implementation of the Telephone Consumer Protection Act of 1991*, Memorandum Opinion and Order, 10 FCC Rcd 12391, 12408 (1995) ("*1995 Reconsideration Order*").

⁹ *Id.* at 12408-09.

with the necessary express permission to send faxes to their *customers*.”¹⁰ As explained above, however, the restriction on sending commercial facsimile advertisements does not apply to not-for-profit associations. Therefore, elimination of the “established business relationship” presumption will have no impact on the ability of trade associations to send facsimile communications.¹¹

The Commission addressed issues related to trade associations in a separate subsection of the *Order*. But the only action that the Commission took was to reaffirm its decision, made in the *1995 Reconsideration Order*, that “publication of one’s fax number in an organization’s directory” does not constitute consent to third parties to send unsolicited facsimile advertisements.¹² Thus, the Commission explained, “a *company* wishing to fax ads to consumers whose numbers are listed in a trade publication or directory must first obtain the express permission of those consumers.”¹³ Nothing in the

¹⁰ *Order* ¶ 189 (emphasis added); see also *id.* ¶ 191 (“[A] *company* that requests a fax number on an application form could include a clear statement indicating that, by providing such fax number, the individual or business agrees to receive facsimile advertisements from that company. . . . We believe that even *small businesses* may easily obtain permission from existing *customers* who agree to receive faxed advertising, when *customers* patronize their stores or provide their contact information.” (emphasis added)).

¹¹ This is consistent with the Commission’s recognition, elsewhere in the *Order*, that communications by not-for-profit associations are not “commercial.” See *id.* ¶ 45 (“[W]e believe Congress clearly intended to exclude tax-exempt nonprofit organizations from prohibitions on telephone solicitations under the TCPA. The legislative history indicates that *commercial* calls constitute the bulk of all telemarketing calls.” (emphasis added)).

¹² *Id.* ¶ 192.

¹³ *Id.* ¶ 193 (emphasis added).

Commission's *Order* addressed the right of not-for-profit associations to send facsimile communications.

In light of the above, the Commission should clarify that its recent *Order* does not alter the rights of not-for-profit associations, including trade associations. In particular, the Commission should make clear that, regardless of what action it takes regarding the "existing business relationship presumption," even after January 1, 2005, associations, when acting pursuant to their not-for-profit purpose, will be permitted to send facsimile communications without restriction. Such communications, by definition, are not "commercial" and, therefore, are not subject to the statutory restriction.

II. IF THE COMMISSION CONCLUDES THAT THE TCPA IS APPLICABLE TO FACSIMILE COMMUNICATIONS SENT BY NOT-FOR-PROFIT ASSOCIATIONS, IT SHOULD ADOPT A PRESUMPTION THAT A PERSON WHO JOINS A NOT-FOR-PROFIT ASSOCIATION CONSENTS TO RECEIVE FACSIMILE "ADVERTISEMENTS" FROM THE ASSOCIATION

As explained above, CEA believes that the statutory restriction on sending unsolicited facsimile advertisements does not apply to not-for-profit associations and, therefore, that the Commission's decision to eliminate the "established business relationship" presumption effective January 1, 2005 will not have any impact on not-for-profit trade associations. If, however, the Commission concludes that the statutory restriction does apply to not-for-profit trade associations, CEA requests reconsideration of the Commission's decision. Specifically, CEA requests the Commission to establish a presumption that a person or company that joins a not-for-profit association – including a

trade association – thereby consents to having the association send facsimile “advertisements.”¹⁴

Restricting the ability of not-for-profit associations, such as CEA, to send facsimile communications to their members would have a significant adverse effect on these organizations. CEA, like many trade associations, uses facsimile communications to advance its not-for-profit purpose. A significant portion of CEA’s facsimile communications – such as updates regarding public policy matters and notices of meetings – cannot be classified as commercial “advertising” under any standard. However, certain facsimile communications – such as requests to pay membership dues or invitations to participate in CEA’s annual Consumer Electronics Show in Las Vegas – conceivably could fall within the Commission’s definition of “advertising.” If, effective January 1, 2005, CEA were required to obtain advance written consent before sending such facsimile communications, CEA’s ability to carry out its not-for-profit activities would be significantly impaired.¹⁵

In order to avoid these adverse consequences, if the Commission concludes that the statutory restriction on unsolicited facsimile advertisements does apply to not-for-profit associations, CEA asks the Commission to create an express presumption

¹⁴ CEA supports petitions, filed by other parties, to retain the established business relationship exception. *See, e.g.*, Newsletter & Electronic Publishers Association, Petition for Reconsideration, CG Docket No. 02-278 (filed Aug. 15, 2003). Even if the Commission chooses not to do so, however, CEA urges the Commission to create a presumption that would allow not-for-profit associations to continue to send facsimiles to their members without restriction.

¹⁵ In certain circumstances, there are no good alternatives to sending a facsimile. Mailing a letter, or having a person place a call, are far more expensive. While e-mail is a useful alternative in some cases, facsimile messages are more likely to be read and retained.

applicable to not-for-profit associations, including trade associations. Specifically, CEA asks the Commission to rule that a person or company that joins a not-for-profit association will be presumed to have consented to receiving the full range of facsimile communications from the association – including any communications that could be classified as “advertisements.”¹⁶

There is ample justification for adopting a different presumption for “association relationships” than for “established business relationships.” Business relationships may be casual or episodic: a consumer sees a product, purchases it, and has no further relationship with the seller. The consumer neither wants nor, in many cases, expects to receive unsolicited communications from the seller. By contrast, the very purpose of joining an association is to have an on-going relationship, in which the association communicates with its members regarding a wide range of issues related to the purpose of the association. The association’s communication may include offers to provide a service or product, related to the association’s not-for-profit purpose, in return for compensation. In such cases, it is reasonable to presume that the member wants, and fully expects, to receive communications that the member has not specifically requested.

III. CONCLUSION

For the foregoing reasons, the Commission should clarify that the *2003 TCPA Order* does not restrict the right of not-for-profit associations, including trade associations, to send facsimile communications in furtherance of their not-for-profit purpose. Alternatively, if the Commission concludes that the *Order* does restrict the right

¹⁶ If the Commission determines that the TCPA restriction applies to facsimile communications by not-for-profit associations, but declines to grant reconsideration, it

of not-for-profit associations to send facsimile communications, CEA requests that the Commission reconsider its decision by creating a presumption that a person or company that joins a not-for-profit association thereby consents to receive facsimile “advertisements” from the association.

Respectfully submitted,

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should – at a minimum – provide clear guidance as to when a communication from a not-for-profit association will be deemed to be a commercial “advertisement.”

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